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No.

IN THE
# SUPREME COURT
OF THE
# UNITED STATES

**OCTOBER TERM, 1990**

WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION,

*Petitioner,*

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9605, requires that the Environmental Protection Agency compile a list of releases of hazardous substances known as the National Priorities List or NPL, and that the NPL be adopted as a rule. Section 113 (a) requires that a challenge to a rule adopted under CERCLA be brought within 90 days of the promulgation of that rule.

The question presented is whether the jurisdictional time limit for challenging an NPL listing can begin to run even though EPA has not yet decided if a particular release will be included as part of a previously-listed NPL site.

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UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

*Respondent.*

**Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## PETITION FOR WRIT OF CERTIORARI

Washington State Department of Transportation respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

## OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (App., 1a-7a) is reported at

917 F.2d 1309. The order of the Court of Appeals denying the petition for rehearing (App., 9a) is not reported.

## JURISDICTION

The judgment of the Court of Appeals was entered on November 2, 1990, and the petition for rehearing was denied on January 11, 1991 (App., 9a). This Court's jurisdiction is based on 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9605, provides in relevant part:

> the President shall, after notice and opportunity for public comments, revise and republish the national contingency plan for the removal of oil and hazardous substances, * * *. Such revision shall include a section of the plan to be known as the national hazardous substance response plan which shall establish procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants, which shall include at a minimum:
>
> * * *
>
> (8)(B) based upon the criteria set forth in subparagraph (A) of this paragraph, the President shall list as part of the plan national priorities among the known releases or threatened releases throughout the United States and shall revise the list no less often than annually. * * *

Section 113(a) of CERCLA, 42 U.S.C. § 9613(a), provides:

> Review of any regulation promulgated under this Act may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), provides in relevant part:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
>
> (1) the owner and operator of a vessel or a facility, *** shall be liable for—
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; * * * (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release * * *

## STATEMENT OF THE CASE

### A. Statutory Background

Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*, to address concern about improper disposal of hazardous substances. CERCLA authorizes the federal government to arrange for the removal of hazardous substances that have been released into the environment and to take action to remedy any harm to the environment. The Environmental Protection Agency (EPA) may arrange for these remedial actions itself or allow other parties to clean up sites for which they are responsible, under EPA's supervision. 42 U.S.C. § 9604; *see also Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S. Ct. 2273, 2277 (1989).

If EPA conducts the remedial action, the site must be included on the National Priorities List (NPL). 40 C.F.R. § 300.425(b)(1); *Eagle-Picher Industries v. EPA*, 759 F.2d 905, 911 n. 26 (D.C. Cir. 1985). The NPL, or the "Superfund list," is a prioritized list of contaminated sites ranked according to the threat they pose to public health or the environment.

This ranking is done by applying the Hazard Ranking System (HRS). 42 U.S.C. 9605(a)(8)(B); 40 C.F.R. § 300.425(c).

Challenges to the NPL are exclusively reviewable in the D.C. Circuit Court of Appeals, and must be filed within 90 days of promulgation. Any issue that could have been raised in an application for review under this section may not be raised in a later proceeding, such as an action for cost recovery. 42 U.S.C. § 9613(a).

CERCLA authorizes EPA to recover all response costs from responsible parties, and allows only limited defenses. 42 U.S.C. § 9607. Responsible parties are generally considered to be jointly and severally liable for the costs incurred in cleaning up a Superfund site. *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988).

## B. The Commencement Bay Nearshore/Tideflats Superfund Site

Commencement Bay is a large (9 square miles) deepwater embayment of southern Puget Sound located in Tacoma, Washington. Commencement Bay, its shoreline, and an industrialized area on its southeast boundary (the Tacoma Tideflats) were designated as "Commencement Bay Nearshore/Tideflats," and listed on the final NPL on September 8, 1983. (App., 10a) *See* 48 Fed. Reg. 40, 658-73 (1983). *See also* Pet. App. at 1-20.[1] The term "nearshore" refers to the offshore area of the bay. The term "Tideflats" refers to a specific geographic area located southeast of Commencement Bay known as the Tacoma Tideflats.

The NPL listing of the Commencement Bay Nearshore/Tideflats site (Commencement Bay site) was based upon Hazard Ranking System (HRS) scores of two sites, the ASARCO Smelter and Hooker Chemical Company, that exceeded the minimum HRS score of 28.50. (Pet. App. at 1-20.) ASARCO and Hooker are both located on the Commence-

[1]Citations to Petitioner's Appendix refer to the record below.

ment Bay shoreline. Hooker is also located in the Tideflats industrial area.

EPA began a remedial investigation/ feasibility study (RI/FS) on the Commencement Bay site in 1984. *See* 40 C.F.R. § 300.430. The final RI/FS report was published in February 1989.

### C. **The Tacoma Spur**

The Tacoma Spur is the colloquial name for Interstate 705, which connects downtown Tacoma to Interstate 5, the main north-south highway in western Washington. (App., 10a) During construction of the Tacoma Spur in 1984, WSDOT discovered buried deposits of coal tar from an abandoned coal gasification plant. This portion of the I-705 right of way is located near downtown Tacoma about two blocks from the City Waterway, which is part of Commencement Bay. This property is not located in the Tacoma Tideflats or on the shoreline.[2]

When WSDOT notified EPA of its discovery, EPA assigned a site number (WAD 9809775460) to the contaminated right of way, but did not indicate to WSDOT that the Tacoma Spur was already part of an identified Superfund site.[3] (Pet. App. at 101-04.) EPA subsequently conducted a preliminary assessment of the Tacoma Spur to evaluate the site as a "potential Superfund site." (Pet. App. at 44-49.) However, the Tacoma Spur was never scored under the Hazard Ranking System and was not individually named to the National Priorities List.

After discovering the coal tar, WSDOT developed and carried out an extensive cleanup plan. This response action involved removing nearly 16,000 tons of tar and contami-

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[2]WSDOT records describe the Tacoma Spur as being built on "reclaimed tidelands." There was some confusion in the proceedings below as to whether this is synonymous with "Tideflats." The two terms are not the same. There are "reclaimed tidelands" all over the Puget Sound region; the "Tideflats" is a specific geographic area southeast of Commencement Bay.

[3]This number is different from that assigned to the Commencement Bay site, which was WAD 980726368.

nated soil to a hazardous waste disposal facility and containing over 26,000 tons of less contaminated soil on site in large concrete vaults. The total cost of this response action to WSDOT was $6 million.[4] WSDOT coordinated its efforts with the Washington State Department of Ecology to insure compliance with hazardous waste regulations. There was no involvement or supervision by EPA in the cleanup effort. The response action was completed in 1986.

In November 1988, EPA again conducted a preliminary assessment of the Tacoma Spur, identifying it under yet another number, D98038579. The purpose of both this assessment and a site inspection was again to evaluate the Tacoma Spur as a "potential" Superfund site. (Pet. App. at 50-89.) *See* 40 C.F.R. § 300.66(a)(4)(iii)(1987).

On April 24, 1989, EPA sent WSDOT a "general notice letter" including the Tacoma Spur in the Commencement Bay site and naming WSDOT as a potentially responsible party for the Commencement Bay cleanup. (Pet. App. at 105-129.)

Although the court was not persuaded that EPA's actions were misleading, EPA admitted that it did not treat the contaminated I-705 right of way as part of the Commencement Bay site until April 1989. *See* Opinion, 917 F.2d at 1312 n.7. Rather, EPA "simultaneously considered whether to treat Tacoma Spur primarily an independent threat or as part of the CBNT [Commencement Bay site]." Resp. Br. at 37 n. 24.

## D. **The Proceedings Below**

WSDOT filed a petition for review July 22, 1989 in the D.C. Circuit Court of Appeals challenging the inclusion of its property in the Commencement Bay site. The court had jurisdiction pursuant to 42 U.S.C. § 9613(a).

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[4]*See Washington State DOT Meets the Challenge of Hazardous Waste*, by Oscar R. George, attached to EPA's Memorandum in Support of Respondent's Motion to Dismiss as Exhibit 2.

The court dismissed the petition as untimely on two alternative grounds. First, the court held that WSDOT was required to file its petition within 90 days of the 1983 Commencement Bay NPL listing because the Tacoma Spur site was within the "broad compass" of the Commencement Bay listing. Second, the court noted that even if the 1983 listing was insufficient to put WSDOT on notice, WSDOT had actual notice that it might be included in the Commencement Bay site when it discovered the coal tar on the I-705 right of way in 1984.

## REASONS FOR GRANTING THE PETITION

The ruling of the D.C. Circuit in this case is contrary to the principle of administrative law that a jurisdictional time period in which a challenge to agency action may be brought does not begin to run until a party is fairly put on notice that it is affected by the agency action. *See, e.g., RCA Global Communications, Inc. v. F.C.C.*, 758 F.2d 722, 730 (D.C. Cir. 1985). It also goes against accepted principles of due process and fundamental fairness, under which an agency may not promulgate a vague rule or take action that is unclear in its intent and later take advantage of its obscure actions to deny a party its statutory right to a hearing. *See, e.g., Recreational Vehicle Indus. Ass'n v. EPA*, 653 F.2d 562, 568 (D.C. Cir. 1981).

The court's decision has created a situation in which EPA has the best of both worlds. Had WSDOT anticipated the possibility that the Tacoma Spur site would be consolidated with the Commencement Bay site and sought review in 1983 or in 1984, the court would likely have found that WSDOT's challenge was not ripe for review. *See Natural Resources Defense Council v. U.S.E.P.A.*, 859 F.2d 156 (D.C. Cir. 1988).

In listing a broad geographic area as a Superfund site, EPA leaves open the question of whether certain properties—and therefore certain parties—will be affected by that Superfund listing. Issues that must be raised in a section

113(a) action will not be ripe for review until EPA resolves this question.[5]

The effect of the D.C. Circuit's ruling is that the ninety day review period in section 113(a) will very often expire long before a party's challenge to an NPL listing is ripe for review. Also, since EPA controls the decision making process with regard to an NPL site, EPA can delay decision making until the ninety day review period has expired. This deprives a party of the right to have issues reviewed that can only be raised in a section 113(a) action, namely whether the inclusion of a site is consistent with CERCLA and the regulations adopted thereunder, and is not arbitrary. *See Eagle-Picher Industries v. EPA*, 822 F.2d 132, 137 (D.C. Cir. 1987) ("Eagle-Picher III"). It is doubtful that Congress intended this result, as it makes section 113(a) meaningless in a large number of NPL sites.

The right to raise the issues that can only be raised under section 113(a) is of substantial importance to property owners, considering the financial impact of being drawn into a Superfund site.[6] It is also of great importance in light of the extremely limited defenses that are available to potentially responsible parties. The Court should grant this petition to protect the rights of parties who are drawn into Superfund sites after the ninety day review period and who are then denied the right to raise as defenses those issues that can only be raised under section 113(a).

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[5]These issues include whether the property affected really merits Superfund-financed cleanup. This issue is of particular importance in this case, where WSDOT conducted a $6 million cleanup at the Tacoma Spur years before being notified that the Tacoma Spur was considered to be part of the Commencement Bay site.

[6]*See SCA Services of Indiana, Inc. v. Thomas*, 634 F.Supp. 1355, 1361-65 (N.D. Ind. 1986) for a discussion of the economic impacts of being named to the National Priorities List. In addition to the economic loss and loss of property value noted in *SCA*, there are legal and technical costs that must be incurred in order to make an adequate administrative record for review.

## I. THE TIME PERIOD IN WHICH A CHALLENGE UNDER SECTION 113(a) MUST BE BROUGHT SHOULD NOT BEGIN TO RUN UNTIL EPA HAS DECIDED WHETHER A RELEASE WILL BE TREATED AS PART OF A PARTICULAR NPL SITE, OR UNTIL THE CHALLENGE IS RIPE FOR REVIEW.

In treating a newly-discovered release of hazardous substances at the Tacoma Spur as a "potential" Superfund site for several years, throughout the cleanup of the Tacoma Spur and throughout the development of a cleanup plan for Commencement Bay,[7] EPA admittedly left it undecided as to whether the Tacoma Spur would eventually be treated as part of the larger Commencement Bay site. When challenged by WSDOT within 90 days of when WSDOT was fairly put on notice that the Tacoma Spur would be considered a part of the Commencement Bay site, EPA took advantage of its own deliberate vagueness and indecisiveness in order to defeat WSDOT's attempt to seek review of EPA's action. The result of EPA's indecision is that WSDOT is precluded from ever raising the issue of whether WSDOT's property actually qualifies for Superfund remediation. Under section 113(a), this issue may only be raised in the D.C. Circuit, and cannot be raised later on when EPA attempts to recover costs from WSDOT.[8]

The issue that WSDOT sought to have reviewed by the D.C. Circuit was whether the Tacoma Spur was legally eligible for Superfund remediation as part of the Commencement Bay Superfund site where (1) the Tacoma Spur is not

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[7]Because of the delay in notifying WSDOT that the Tacoma Spur was part of the Commencement Bay site, WSDOT was also deprived of the opportunity to participate in the development of the Commencement Bay cleanup plan. This participation is the only way a potentially responsible party can attempt to control the costs incurred at a Superfund site, and is its only real "defense." WSDOT was also deprived of the opportunity to contribute to the administrative record, and any judicial review is limited to the administrative record. 42 U.S.C. § 9613(j).

[8]EPA argued in opposition to WSDOT's challenge that the issues WSDOT raised were more properly reserved for a later cost recovery action, but this argument is in direct contradiction to the language of section 113(a).

located on Commencement Bay, (2) the Tacoma Spur was never scored by EPA under the Hazard Ranking System, nor was it listed on the NPL, (3) and the Tacoma Spur site had been thoroughly cleaned up by WSDOT several years earlier. This issue did not arise until EPA resolved the factual question of whether the Tacoma Spur would be treated as part of the Commencement Bay Superfund site, which was in April 1989. The court's ruling denies WSDOT the opportunity to raise as a defense the fact that the site is cleaned up.

This Court has set out the standards for ripeness for review in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) and in *Toilet Goods Association, Inc. v. Gardner*, 387 U.S. 158 (1967). The Court set out a two-step inquiry: "first to determine whether the issues tendered are appropriate for judicial resolution, and second to assess the hardship to the parties if judicial relief is denied at that stage." *Toilet Goods Assoc.*, 387 U.S. at 162. Had WSDOT raised its challenge to the Commencement Bay listing in 1983 or in 1984, it is likely that the court would have found the challenge not yet appropriate for judicial resolution, and it is unlikely that WSDOT could have shown such hardship as to overcome a denial of review at that time.

In 1983, WSDOT was just acquiring property for the Tacoma Spur, including the property on which the contamination was found. A challenge to the Commencement Bay listing with regard to WSDOT's property would have been inappropriate for judicial resolution because it would have depended on resolution of a number of facts that EPA had not yet addressed, including the determination of which properties were contaminated. WSDOT would have had to make its challenge in a very generalized manner, and could not have cited to any specific application of the listing by EPA to WSDOT's property. As the D.C. Circuit has itself noted in another case, "Fitness for review is not satisfied when 'judicial appraisal . . . is likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in the framework of this

generalized challenge made here.'" *ACLU v. FCC*, 823 F.2d 1554, 1557 (D.C. Cir. 1987) (quoting *Toilet Goods Ass'n*, 387 U.S. at 164). In 1983, WSDOT's claim would have had to rest on highly speculative arguments, where the property being acquired was not even known to be contaminated and EPA appeared to be concerned only with the pollutants being released by shoreline and Tideflats industries. (Pet. App. at 1-20.) In effect, WSDOT would have been asking the court for an advisory opinion, in violation of the "case or controversy" requirement of Article III. *See Natural Resources Defense Council v. U.S.E.P.A.*, 859 F.2d 156, 165 (D.C. Cir. 1988).

After the discovery of hazardous substances at the Tacoma Spur in 1984, EPA has admitted that it "simultaneously considered" whether to treat the Tacoma Spur as a separate Superfund site, whose NPL listing would have triggered a new ninety day review period, or to treat it as part of Commencement Bay, for which the ninety day review period had expired. The documents that form part of the administrative record show that as late as November 1988 EPA was evaluating the Tacoma Spur as a "potential" Superfund site. (Pet. App. at 50-89.) EPA argued that this is all part of its "standard administrative practice." Res. Br. at 36. Regardless, it is clear that EPA had not yet resolved the issue of whether the Tacoma Spur would be considered as part of Commencement Bay until after November 1988.

In *Natural Resources Defense Council v. U.S.E.P.A.*, the D.C. Circuit found that a statute requiring review of Clean Water Act regulations within ninety days of their promulgation did not prevent the court from finding that challenges to the regulations were not yet ripe for review. 859 F.2d 156, 167 (D.C. Cir. 1988). The court noted that the claims raised were "not by any means so purely legal as to

be clearly fit for review, . . ." *Id.*[9] The court also distinguished *Eagle-Picher Industries, Inc. v. E.P.A.*, 759 F.2d 905 (D.C. Cir. 1985), in which the court had reviewed a CERCLA regulation under 42 U.S.C. § 9613(a), by noting that the issues in that case were "pure ones of law" and that EPA's position was "final and fully crystallized." *NRDC*, 859 F.2d at 166. In the present case, EPA's position on whether the Tacoma Spur was part of the Commencement Bay Superfund site was not "final and fully crystallized" until 1989. Thus, under the D.C. Circuit's application of the ripeness doctrine set out by this Court, the issues raised by WSDOT were not ripe for review until sometime after November 1988, when EPA decided to include the Tacoma Spur as part of the already-listed Commencement Bay site instead of listing it as a separate Superfund site.

There is no question that at the time contaminants were discovered at the Tacoma Spur in 1984, the Tacoma Spur had the potential to be listed as a Superfund site on its own. Coal tar is a hazardous substance under CERCLA, and vast quantities of it were found at the Tacoma Spur. However, EPA did not name the Tacoma Spur to the NPL. EPA investigated the Tacoma Spur as a "potential" Superfund site in 1984, and then took no further action. EPA made no objections or comments when WSDOT undertook its own cleanup efforts. EPA provided no oversight for the response action, as it is required to do under section 104 when a party performs its own cleanup at a Superfund site. *See* 42 U.S.C. § 9604(a). Certainly if a state agency were undertaking a cleanup project of the magnitude of the Tacoma Spur cleanup at an identified Superfund site, EPA would be expected to at least show some concern. The fact that EPA had no interest in WSDOT's cleanup is evidence that the Tacoma

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[9]The provision in the Clean Water Act, 33 U.S.C. § 1369(b), is virtually identical to 42 U.S.C. § 9613(a), except that it allows challenges to be made after the expiration of ninety days "*only* if such application is based *solely* on grounds which arose after such ninetieth day." (emphasis added). However, the court appeared to have based its ruling not on this language, but on the common law principles of ripeness. The court did not indicate that the same grounds for review could not be raised at a later time when factual issues were resolved.

Spur was not considered by EPA to be part of the Commencement Bay site at that time.

EPA completely ignored the Tacoma Spur site until 1988, long after the WSDOT cleanup was complete and the highway constructed, when EPA undertook another investigation of the Tacoma Spur as a "potential" Superfund site. EPA admitted in the proceedings before the D.C. Circuit that it "simultaneously considered" whether to treat the Tacoma Spur as part of Commencement Bay or as a separate problem. Res. Br. at 37.

The result of this common practice by EPA is that the agency can delay identifying what areas will be included as part of a given Superfund site until opportunities for challenging the agency's decision have expired. At the Commencement Bay site, EPA delayed this decision until the studies and cleanup plans were nearly completed, almost eight years after the site was listed.[10] EPA can include within the "broad compass" of a Superfund site property that may or may not pose a CERCLA problem, and by not identifying the scope of the site until after the 90 days for challenging the listing expires, avoid any challenge as to whether that property really merits Superfund-financed remediation. This application of a sort of "rubber boundary" has the effect of denying affected parties the right to raise the issue of whether their property is sufficiently contaminated to warrant being drawn into the Superfund process.

It is a relatively common practice for EPA to define as an NPL site a broad geographic area rather than a discrete release of hazardous substances, in spite of the fact that CERCLA refers to the NPL as a list of "releases."[11] 42 U.S.C. § 9605. The NPL contains numerous other listings

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[10]Commencement Bay was first listed on the interim priority list in 1981.

[11]During the comment period on the original NPL in 1983, EPA received comments regarding the listing of a site entitled "Whitewood Creek" located in South Dakota. The commentor noted that the site was really several sites, and should be listed as such. Pet. App. at 21-25.

that are geographic areas, rather than individual industrial or landfill sites. *See* 40 C.F.R. § 300 App. B.[12]

## II. THE RULING IN THIS CASE IS IN CONFLICT WITH THE D.C. CIRCUIT'S RULINGS IN SIMILAR CASES.

The D.C. Circuit noted in *Eagle-Picher Industries v. EPA* that it has reviewed otherwise untimely claims in "a limited number of exceptional circumstances where the petitioner lacked a meaningful opportunity to challenge the agency action during the review period due to, for example, inadequate notice that the petitioner would be affected by the action . . . ." 759 F.2d 905, 911 (D.C. Cir. 1985) ("Eagle-Picher I") (citing *Recreational Vehicle Indus. Ass'n v. EPA*, 653 F.2d 562, 567-68 (D.C. Cir. 1981)). This case is one of the "exceptional circumstances" that the D.C. Circuit has specifically identified as justifying an otherwise untimely claim.

In *Recreational Vehicle Indus. Ass'n v. EPA (RVIA)*, the D.C. Circuit allowed a petitioner to challenge EPA noise regulations after the expiration of the 90 day review period where the applicability of the regulations to the petitioner was unclear. 653 F.2d 562 (D.C. Cir. 1981). The court reject-

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[12]WSDOT itself is a potentially responsible party at another Superfund site in Washington State where this same problem occurs, the Eagle Harbor/Wyckoff site. WSDOT owns and operates a ferry terminal on the north shoreline of Eagle harbor, which is located west of Seattle across part of Puget Sound. The site was originally listed based on releases of a hazardous substance, creosote, from the Wyckoff Company, a now-inoperative wood treatment plant located on the south shoreline of Eagle Harbor. After expiration of the ninety day review period, EPA designated other shoreline and upland property owners as PRPs, including WSDOT. After years of study, there is no evidence that WSDOT's property itself would have ever been shown to pose a serious enough threat to the environment to warrant Superfund-financed cleanup. There is no relationship whatsoever between the Wyckoff property and the WSDOT property; they are not contiguous and are separated by the harbor. However, inclusion of WSDOT, a state agency, gives EPA a deep pocket from whom to recover all of the costs it incurs at Eagle Harbor, including any that the Wyckoff Company is unable to pay. Certainly the same motivation exists for including WSDOT at the Commencement Bay site, where many shoreline and Tideflats industries that contributed to the contamination of the bay may be unable to bear their proportionate shares of the cleanup costs.

ed EPA's contention that the petition was untimely, and explained:

> Before any litigant reasonably can be expected to present a petition for review of an agency rule, he must first be put on fair notice that the rule in question is applicable to him. Otherwise the agency could promulgate a confusing regulation and, after expiration of the time for any judicial contest, clarify it to the surprise and prejudice of a party whose opportunity for judicial review meanwhile has been extinguished. Here, for a considerable period, EPA left unclear the applicability of its truck regulations to the motor home industry. The agency cannot now take advantage of the obscurity of intentions in order to defeat rights statutorily conferred.

653 F.2d at 568 (citation omitted).

This is just such an instance where EPA promulgated a confusing regulation and did not clarify its application to WSDOT until the opportunity for judicial review had long expired. First, the description of the site was general and vague; according to EPA's explanation, all property owners in the general Tacoma area should have been on notice that they were potentially affected by the listing of the Commencement Bay site. While an owner of known contaminated property along the shoreline of Commencement Bay may have been on notice, the owner of upland property that was not known to be contaminated at the time of the listing could not be expected to have known that it was potentially affected by such a listing.[13] Second, when the contamination was discovered in 1984 until at least November 1988, EPA treated the site as a potential new Superfund site, not as if it were already part of the Commencement Bay site. Where the wording of the regulation left its applicability unclear and EPA's actions clearly indicated that the regulation was not applicable to WSDOT, the time period for challenging the regulation should have been tolled until WSDOT got

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[13]No comments were received by EPA when the Commencement Bay site was listed, despite the fact that hundreds of property owners are now affected.

actual notice on April 25, 1989. The ruling in this case is thus totally inconsistent with the court's ruling in *RVIA*.

In allowing an otherwise untimely petition for review in another case, the court stated:

> Although statutory time limitations on judicial review of agency action are jurisdictional, self-evidently the calendar does not run until the agency has decided a question in a manner that reasonably puts aggrieved parties on notice of the rule's content. *None of the cases in this circuit even remotely suggest the contrary.*

*RCA Global Communications, Inc. v. F.C.C.*, 758 F.2d 722, 730 (D.C. Cir. 1985)(citation omitted) (emphasis added). In this case, however, the result does suggest the contrary. The time for filing a petition for review should have been tolled until WSDOT was on notice of the "content" of the rule listing Commencement Bay, or in other words, until WSDOT was on notice that this listing included the Tacoma Spur.

In *American Trading Transportation Company, Inc. v. U.S.*, the court found that no time limit barred the petitioners from challenging Maritime Administration ("Marad") regulations where those regulations were applied in ways that petitioners could not have anticipated when the regulations were adopted. 791 F.2d 942, 950 (D.C. Cir. 1986). Although it did not rule on the timeliness issue, the court noted:

> [T]he language of the regulation gave appellants no notice that Marad would interpret it to block full consideration of their interests. Had they challenged the rule at the time of promulgation, before the agency developed this interpretation, *we would no doubt have found the challenge unripe for review because the harm appellants now claim they have in fact suffered would, at that time, have been only speculative.* No time limit bars appellants from challenging a regulation that, they allege, is currently being used in a particular proceeding to harm them in a way they could not have anticipated at the time the rule was adopted.

*Id.* at 950 n.11 (citations omitted) (emphasis added). This comment applies as well to WSDOT, as explained in more detail *supra*.

Most recently, the court found in *National Air Transportation Ass'n v. McArtor* that a notice published in the Federal Register was inadequate in that it mislead the reader as to a regulation's applicability. 866 F.2d 483, 485-86 (D.C. Cir. 1989). The court held that the sixty day review period was therefore tolled until petitioner received notice that it was affected by the regulation, which was when petitioner received an "advisory circular" from FAA outlining the new rules. *Id.*

Likewise in this case, the 90 day period in which WSDOT had to petition for review should also have been tolled until WSDOT received clear notice from EPA that it was potentially affected by the Commencement Bay NPL listing, which was when it received the "general notice letter" on April 25, 1989. WSDOT could not have known from the 1983 publication in the Federal Register that it was affected, both because the description did not appear to include WSDOT's property and because WSDOT—and EPA—did not know that the Tacoma Spur property was contaminated. In addition, EPA's treatment of the site as something separate from the Commencement Bay site for several years led WSDOT to believe that the Tacoma Spur was separate from the Commencement Bay site.

EPA has done in this case just what it attempted and failed to do in the *RVIA* case: to "take advantage of the obscurity of intentions in order to defeat rights statutorily conferred." 653 F.2d at 568. As an affected property owner, WSDOT has a statutory right under 42 U.S.C. § 9613(a) to challenge the inclusion of its property within an NPL site. EPA has taken advantage of not only the vagueness of its initial listing, but also the misleading nature of its own actions in dealing with this site in order to defeat WSDOT's right to obtain review.

Section 113(a) requires that a challenge to an EPA administrative rule adopted under CERCLA be brought only

in the D.C. Circuit. Other courts have refused to review challenges on the basis of this limitation. *See, e.g., D'Imperio v. United States*, 575 F.Supp. 248 (D.N.J. 1983). Thus, there will be no opportunity for law in this area to develop in any other circuits. The D.C. Circuit has exclusive jurisdiction over the question of when a challenge to an NPL listing must be brought, and has made its position on the issue clear. The issue of when an NPL listing must be appealed is therefore ready for determination by this Court.

## III. THE QUESTION OF WHEN A CHALLENGE TO AN NPL LISTING MUST BE BROUGHT IS OF GREAT IMPORTANCE TO PROPERTY OWNERS.

The issue of when a challenge to an NPL listing may be brought presents a question of substantial importance for all those who own property anywhere near a Superfund site or a "potential" Superfund site. The question takes on much more importance when considered in light of (1) the enormous cost associated with the Superfund program; (2) the fact that these costs are recoverable from the parties involved, who are jointly and severally liable; and (3) the extremely narrow defenses available to parties in cost recovery actions.

Although the NPL lists only about 1200 sites, EPA has identified nearly 32,000 "potential" Superfund sites.[14] The Tacoma Spur was one of these thousands of "potential" NPL sites before it was incorporated into the already-listed Commencement Bay site. It is impossible to estimate how many of 32,000 "potential" Superfund sites are similarly situated to the Tacoma Spur, and how many parties will be (or have been) similarly deprived of their opportunity to seek review of EPA's inclusion of their property into already-listed Superfund sites.

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[14] *EPA's Implementation of the Superfund Program: Hearing Before the Subcommittee on Investigations and Oversight, House Committee on Public Works and Transportation*, 101st Cong., 1st Sess. 33 (1989).

EPA admits that the average site cleanup cost is now around $20 million. 54 Fed. Reg. 33846, 33850 (1989). This does not include EPA's own administrative costs, which are also passed on to responsible parties.[15] Even accepting EPA's average, the total cost of remediating only those sites currently on the NPL is $24 billion.

One of the policies underlying CERCLA is that those who cause pollution, rather than innocent parties or taxpayers, should pay for cleanup. However, EPA's practice of drawing unrelated parties into larger Superfund sites runs counter to this policy, especially in the case of a government agency such as WSDOT. Imposing joint and several liability on WSDOT will still require taxpayers to bear the burden of cleanup costs that should be borne by those who caused the contamination. Even if joint and several liability is not eventually imposed, the public will still have to bear the costs associated with defending a state agency at a large Superfund site.

## CONCLUSION

The petition for writ of certiorari should be granted. In the alternative, the Court should summarily reverse the ruling of the D.C. Circuit Court of Appeals in this case.

Respectfully submitted this 3rd day of April, 1991.

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[15]Because of its size and complexity, the cleanup of Commencement Bay will undoubtedly cost many times this "average" cost.

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# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued October 15, 1990 Decided November 2, 1990

No. 89-1445

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,
PETITIONER,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT.

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Petition for Review of an Order of the
Environmental Protection Agency

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*Deborah L. Cade,* with whom *Kenneth O. Eikenberry* and *Charles F. Secrest* were on the brief, for petitioner.

*Russell M. Young,* Attorney, United States Department of Justice, with whom *Richard B. Stewart,* Assistant Attorney General, *E. Donald Elliot,* General Counsel, and *Earl Salo,* Assistant General Counsel, Environmental Protection Agency, were on the brief, for respondent.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

*Margaret Kane Harrigan*, Attorney, United States Department of Justice, also entered an appearance for respondent.

Before: EDWARDS, D.H. GINSBURG and SENTELLE, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* EDWARDS.

EDWARDS, *Circuit Judge*: The petitioner in this case, Washington State Department of Transportation ("WSDOT"), challenges a decision by the Environmental Protection Agency ("EPA") to include property WSDOT owns on a list of contaminated environmental areas subject to federal cleanup under the "Superfund" program. WSDOT claims that the EPA designated its property as part of a larger, pre-existing Superfund priority site without first affording WSDOT notice and an opportunity to comment. It also claims that the EPA did not follow its own regulations in determining the site's geographic scope. WSDOT asks this court to require the EPA to remove its property from the Superfund list and to give it an opportunity to comment before any future attempt to redesignate the property as a Superfund site.

Because WSDOT had reasonable notice some years ago that its property was potentially affected by the 1983 site listing, and because it failed to seek judicial review within the 90-day limitations period imposed by statute, *see* 42 U.S.C. § 9613(a) (1988), we deny the petition as untimely.

## I. BACKGROUND

In 1983, the EPA promulgated a list of areas throughout the United States known to be contaminated by hazardous wastes. Sites included on the so-called National Priorities List ("NPL") are considered the leading candidates for cleanup financed by the Superfund program. *See* 42 U.S.C. § 9605(8)(B) (1988). "[T]he modest and limited purposes" of the NPL within the Superfund scheme have been well described in previous cases. *See, e.g., Eagle-Picher Industries v. EPA*, 759 F.2d 922, 932-33 (D.C. Cir.

1985) ("*Eagle-Picher II*"); *Eagle-Picher Industries v. EPA*, 759 F.2d 905, 919-21 (D.C. Cir. 1985) ("*Eagle-Picher I*"). It is sufficient to restate here that Congress intended the EPA to employ the NPL as a tool for identifying quickly and inexpensively those sites meriting closer environmental scrutiny.

Among the 400-odd locations included on the initial NPL were two portions of Commencement Bay, part of Puget Sound in Washington state. One of those sites, which concerns us here, was listed as "Commencement Bay Nearshore/Tideflats." After notice and comment, the NPL was promulgated as a final rule on September 8, 1983. *See* 48 Fed. Reg. 40,658-73 (1983).

In keeping with agency policy,[1] the EPA did not specify any exact geographic boundaries of the Commencement Bay Nearshore/Tideflats site. Background documents concerning the site simply described it as the "Tideflats industrial area," a stretch of Commencement Bay in Tacoma, Washington, peppered with docks, manufacturing and processing plants and other industrial facilities.[2]

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[1]It is the policy of EPA that it need not specify precise geographic boundaries in designating a NPL site, and that if boundaries are initially defined they may be enlarged later if additional study reveals a wider scope of contamination. *See, e.g., Eagle-Picher Industries v. EPA*, 822 F.2d 132, 144 n.59 (D.C. Cir. 1987) ("*Eagle Picher III*") (per curiam). This policy was most recently enunciated in 54 Fed. Reg. 13,298 (1989) ("EPA contemplates that the preliminary description of facility boundaries at the time of scoring will need to be refined and improved as more information is developed as to where the contamination has come to be located").

[2]The general description of the site provided in EPA documentation connected with the site listing stated:

> COMMENCEMENT BAY — NEARSHORE/TIDEFLATS
> INDUSTRIAL AREA
> Tacoma, Washington
>
> The Commencement Bay — Nearshore/Tideflats Industrial Area in Tacoma, Washington, includes heavy industry such as aluminum processing, chemical, pulp and paper, and pri-

Unable to know without further study precisely which of these industrial sources were responsible for the pollution, the EPA conducted investigations of two facilities to confirm its suspicion that shoreline industrial properties were polluting the Bay. These two facilities — a Hooker Chemical Company plant and an ASARCO copper smelter — were evaluated according to criteria embodied in the Hazard Ranking System ("HRS")[3] and produced scores sufficient to justify NPL listing. Based on these HRS data and on more generalized documentation of pollution in Commencement Bay, the EPA listed the "Nearshore/Tideflats" site on the NPL.

WSDOT owns property located some 500 feet from a man-made tributary of Commencement Bay known as City Waterway and about three miles from the Hooker chemical plant. WSDOT acquired the property, which had long been used for a variety of industrial activities, in 1983 in order to construct an urban highway connecter known as the Tacoma Spur. During the course of readying the site for construction in 1984, WSDOT discovered hidden deposits of hazardous waste left from earlier industrial uses. A consultant hired by WSDOT to study contamination at the Tacoma Spur site advised WSDOT that pollution from the property was seeping into the nearby City Waterway through underground channels.[4]

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mary metal smelting. Contamination is known to be in the industrial waterways and several land areas in the Tideflats. Problems include arsenic-laden slag and airborne dust, chemical contamination of soil and sediment, and industrial wastes.

Hazard Ranking System Worksheet for Commencement Bay Nearshore/Tideflats Site, *reprinted in* Petitioner's Appendix 1.

[3]The HRS was reviewed and upheld by this court in *Eagle-Picher I*, 759 F.2d 905.

[4]*See* HART-CROWSER & ASSOCIATES, SOIL AND GROUND WATER QUALITY EVALUATION, SR-705 TACOMA SPUR 16 (1984) ("Ground water containing contamination from beneath the [Tacoma Spur] project site flows directly to the City Waterway."), *reprinted in part in* Respondent's Appendix 5.

WSDOT promptly notified the EPA of its discovery and undertook its own efforts to remove the waste and eliminate the hazard. The EPA, following routine procedure, assigned the location a separate EPA site identification number and, over the next several years, undertook preliminary assessments of the property to determine whether it might qualify as a Superfund cleanup site.

In April 1989, the EPA notified WSDOT that its property was considered part of the earlier-announced Commencement Bay Nearshore/Tideflats site and that it was considered a "potentially responsible party" for the costs of cleaning up both its own property and the Bay itself. Three months later, WSDOT brought this action challenging the 1983 designation of the Commencement Bay site.

## II. Analysis

The designation of a hazardous waste site on the NPL is considered rulemaking subject to judicial review under 42 U.S.C. § 9613(a) (1988). *See Northside Sanitary Landfill, Inc. v. Thomas*, 849 F.2d 1516, 1517 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 1528 (1989). That statutory provision requires that "application [for judicial review] . . . be made within ninety days from the date of promulgation" of the contested regulation. Since the Commencement Bay listing was promulgated on September 8, 1983, the statutory period for judicial review expired on December 7, 1983. Because WSDOT did not bring this action until July 21, 1989, its challenge is plainly time barred unless it was deprived of reasonable notice that it had an interest in the action. *See Recreation Vehicle Indus. Ass'n v. EPA*, 653 F.2d 562, 568 (D.C. Cir. 1981) ("Before any litigant reasonably can be expected to present a petition for review of an agency rule, he first must be put on fair notice that the rule in question is applicable to him.").

Under established law, the EPA may include specific parcels of land within a NPL site so long as they are within the broad compass of the notice provided by the

initial NPL listing. In *Eagle-Picher Industries v. EPA*, 822 F.2d 132 (D.C. Cir. 1987) ("*Eagle-Picher III*") (per curiam), this court held that the EPA may alter or expand the boundaries of a NPL site if subsequent study reveals a wider-than-expected scope of contamination.[5] Nor is the EPA required in every instance to assign a separate HRS score to each parcel within a NPL site. *See id.* at 141-42.[6]

WSDOT's Tacoma Spur property plainly fell within the broad compass of the 1983 Commencement Bay listing. The property is located 500 feet from Tacoma's City Waterway, a short inlet off Commencement Bay. It lies at the core of a heavy industrial area and was itself long used for industrial purposes. It is just three miles from the Hooker chemical plant and five miles from the ASARCO copper smelter whose HRS scores supported the site's NPL designation. The nametag assigned the NPL site did not suggest that it was limited to a particular industrial facility, but instead used the name of a broader region, of which WSDOT had reason to know its property could be considered a part.

If there was any doubt about the sufficiency of the notice provided WSDOT by the 1983 listing of the Commencement Bay site, that doubt vanished in 1984 when WSDOT's own consultant advised it that its Tacoma Spur property was contributing to the pollution of City

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[5]In *Eagle-Picher III*, a NPL site was expanded from 15 square miles to 115 square miles as the EPA discovered the full extent of contamination. "Standing alone," the court noted, "the change in the Agency's description of the site's size does nothing more than indicate the Agency's acquisition of more accurate information on the scope of the contamination." 822 F.2d at 144 n.59.

[6]Also in *Eagle-Picher III*, the affected property owner objected to the placement of its property on the NPL based partly on inferences drawn from HRS scores derived from neighboring property. This court rejected the petitioner's claim that its site listing "was based on data improperly borrowed" from another site as "exalt[ing] form over substance." 822 F.2d at 141. It was sufficient, the court held, that the EPA borrowed HRS data from a closely related neighboring site and corroborated it with observations specific to the non-HRS site. *See id.* at 142.

Waterway, which WSDOT acknowledges "is part of Commencement Bay." Brief for Petitioner at 3. Having reported this matter to the EPA, WSDOT was then — if not before — on notice that its property might be considered part of the Commencement Bay listing.[7]

Because WSDOT did not file its petition for judicial review within 90 days of the September 1983 NPL listing — or, if we assume that WSDOT was in need of "actual notice," within 90 days of its discovery in 1984 that its own property was contaminated and could be polluting nearby Commencement Bay — its petition is untimely under 42 U.S.C. § 9613(a) (1988) and must be denied.

## III. Conclusion

The petition is denied.

*So ordered.*

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[7]We are not persuaded that WSDOT was deprived of notice because it was "misled" by EPA's response to its report of contamination at the Tacoma Spur property. While it is true that WSDOT's report to EPA set in motion a standard bureaucratic response, including the assignment of a new EPA site identification number to the Tacoma Spur property, we remain convinced that WSDOT had ample warning that its property was very likely contributing to the despoliation of Commencement Bay and that it might therefore have an interest in the Commencement Bay NPL site designation.

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 89-1445** **September Term, 1990**

WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION
PETITIONER

V.

U.S. ENVIRONMENTAL PROTECTION AGENCY

**PETITION FOR REVIEW OF AN ORDER OF THE ENVIRONMENTAL PROTECTION AGENCY**

BEFORE: EDWARDS, D.H. GINSBURG and
SENTELLE, Circuit Judges

JUDGMENT

This cause came on to be heard on the petition for review of an order of the Environmental Protection Agency and was argued by counsel. On consideration thereof, it is

**ORDERED** and **ADJUDGED**, by the Court, that the petition for review is denied, in accordance with the Opinion of the Court filed herein this date.

**Per Curiam**
FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

Date: November 2, 1990
Opinion for the Court filed by Circuit Judge Edwards

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUI

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**No. 89-1445** **September Term, 1990**

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION
PETITIONER

V.

U.S. ENVIRONMENTAL PROTECTION AGENCY
RESPONDENT

BEFORE: EDWARDS, D. H. GINSBURG and SENTELLE, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing, filed December 17, 1990, it is

**ORDERED**, by the Court, that the petition is denied.

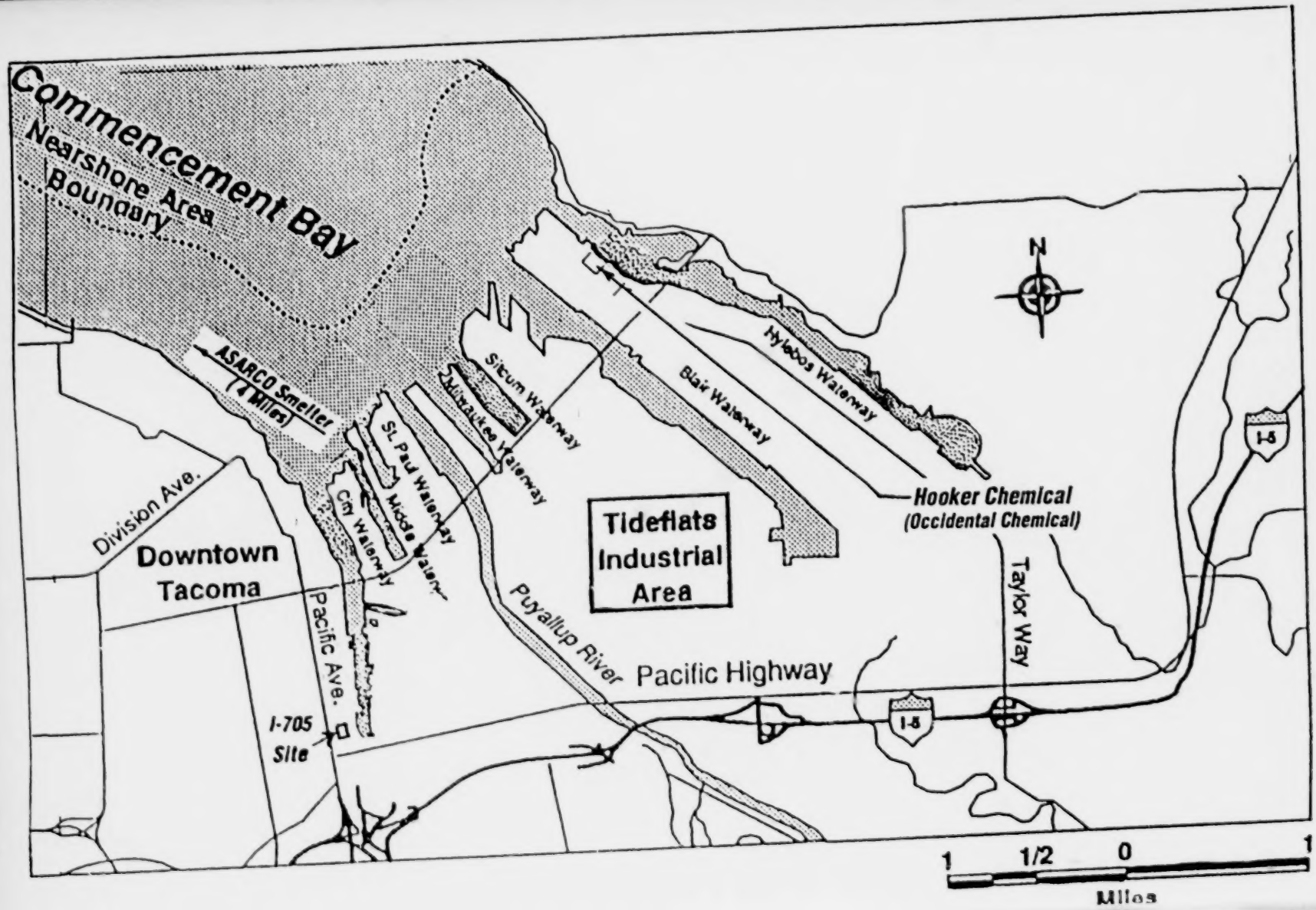
Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY:

ROBERT A. BONNER
DEPUTY CLERK

Filed January 11, 1991

BEST AVAILABLE COPY


Commencement Bay
Nearshore Area
Boundary
ASARCO Smelter
(4 Miles)
Division Ave.
Downtown
Tacoma
Pacific Ave.
I-705
Site
City Waterway
Middle Waterway
St. Paul Waterway
Milwaukee Waterway
Sitcum Waterway
Blair Waterway
Hylebos Waterway
Tideflats
Industrial
Area
Puyallup River
Pacific Highway
Hooker Chemical
(Occidental Chemical)
Taylor Way
I-5
N
1
1/2
0
1
Miles